



HM Courts & Tribunals Service

Appeal no. EA/2010/0150

**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Before

Brian Kennedy QC
David Wilkinson
Tony Stoller

BETWEEN

BRITISH BROADCASTING CORPORATION

Appellant

and

ONE TRANSPORT LIMITED

First Additional Party

and

INFORMATION COMMISSIONER

Respondent

and

MATTHEW DAVIS

Second Additional Party

Representation:

For the Appellant: Nicola Cain
For the First Additional Party: Michael Seifert
For the Respondent: Edward Capewell
For the Second Additional Party: Matthew Davis (“the Complainant”)

Date of Hearing: 17 & 18 February 2011
Date of Decision: 11 April 2011

DECISION

The Tribunal allows the Appeal and substitutes the following decision notice in place of the decision notice dated 21st July 2010.

Substituted Decision Notice

The Tribunal holds that the BBC are correct in withholding the requested information concerning the actual sum that the BBC pays to One Transport under contract for the provision of services by One Transport Limited on the grounds that the qualified exemption provided in the provisions of Section 43(2) of the Act are engaged and that in all the circumstances it is not in the public interest to disclose the requested information.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

Reasons for Decision

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 (“FOIA”) as modified by regulation 18 of the Environmental Information Regulations 2004 (“the EIR”). The Tribunal and the parties worked from an open Trial Bundle (“TB”) indexed and paginated and from a smaller Closed Bundle (“CB”) also indexed and paginated. We have also been provided with an indexed Authorities Bundle (“AB”).

Background to the Appeal:

[2] On 6 April 2009, Mr. Davis, the Complainant, (“the second additional party”), on behalf of ‘DataNews’ made a lengthy and detailed request for information to the British Broadcasting Corporation, (“the Appellant”) for information relating to its contractual arrangements with a company called One Transport Limited (“the First Additional Party”). The first additional party is a ground transportation booking and management company that provides taxi services to the appellant.

[3] Inter-alia, the second additional party requested the following information (hereafter referred to as “the Disputed Information”) - *“In the 08/09 financial year how much money did the BBC pay to One Transport for the provision of taxis to the BBC? What proportion of the total taxi budget for the 08/09 financial year did this payment to One Transport amount to?”*

[4] The appellant responded to the second additional partys’ request on 4 May 2009 providing all of the requested information about the contract but refused to disclose the Disputed Information claiming that it was exempt under section 43(2) FOIA because disclosure would be likely to prejudice the commercial interests of the appellant and first additional party. This decision was upheld on internal review within the BBC and the complainant was notified on the 26th June 2009.

[5] On the 14th July 2009 the complainant contacted the Information Commissioner, (“the Respondent”).

[6] After deliberation the respondent served a Decision Notice dated 21 July 2010 pages 1-22 of the Open trial bundle.

[7] In considering whether disclosure would, as claimed by the appellant, be likely to prejudice the commercial interests of both the appellant and the first additional party, the respondent took account of the decision in *Hogan & Oxford City Council v Information Commissioner EA/2005/0026 & 0030* in which it held that the “evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice” and that the prejudice must be “real, actual or of substance”.

[8] The respondent also took account of the Tribunal’s decision in *John Connor Press Associates Ltd v Information Commissioner EA/2005/0005* in which it was held that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.

[9] The respondent’s analysis of the likelihood of prejudice to the commercial interests of the appellant is set out at §§ 39 to 52 of the Decision Notice. The respondent found that the “.. *only cogent argument put forward by the BBC with regard to the likelihood of prejudice to its own commercial interests is the ability of the BBC to negotiate in a competitive market ...[and] ..the Commissioner finds this to be a generic argument unsupported by evidence*” (§ 48 Decision Notice). The respondent concluded that the appellant had failed to discharge the evidential burden placed upon it and that he had not been persuaded that disclosure of the Disputed Information “.. would have been likely to have any of the prejudicial effects cited” (§ 52 Decision Notice).

[10] The respondent’s analysis of the likelihood of prejudice to the commercial interests of the first additional party is set out at §§ 53 to 71 of the Decision Notice. The respondent noted that it was not for a public authority to speculate as to the likely prejudice to a third party’s commercial interests (§ 64 Decision Notice). Whilst the appellant provided evidence that the first additional party were of the view that disclosure would prejudice its commercial interests, no explanation was provided by the first additional party as why this would be the case (§ 65 Decision Notice). The respondent concluded that insufficient evidence had been put forward to support the contention that disclosure would be likely to prejudice the commercial interests of the first additional party (§ 69 Decision Notice).

[11] The appellant appeals by way of a notice of appeal dated 18 August 2010. The appellant maintains that the Commissioner erred in finding quote that:–

“• *the BBC’s negotiating position would not be undermined in the forthcoming tender process by the disclosure of the Disputed Information* (§ 48 Decision Notice),

- *the disclosure of the Disputed Information would not reveal One Transport's pricing and profit margins (§ 40 Decision Notice),*
- *the release of the Disputed Information could not impact on the commercial interests of the BBC in any meaningful way (§ 49 Decision Notice),*
- *the disclosure of the Disputed Information would not provide valuable pricing information to future bidders during the forthcoming tender process (§ 50 Decision Notice),*
- *the BBC's ability to provide value for money would not be impacted by the disclosure of the requested information (§ 51 Decision Notice),*
- *the information of most significance and real commercial sensitivity is limited to the pricing mechanism / model (§ 66 Decision Notice), and*
- *the disclosure of the Disputed Information would not be likely to prevent One Transport from being able to compete fairly in the future for other contracts (§ 68 Decision Notice). “*

[12] The respondent maintains that, on the evidence before him, he was correct to reach the conclusions he did in respect of the above matters. This Tribunal have the advantage of having heard detailed evidence from at least some of the parties since the respondent issued his Decision Notice.

[13] The appellant asserts that the respondent was wrong to find that the disclosure of the Disputed Information would not, or would not be likely to, be prejudicial to the appellants' and first additional partys' commercial interests. The appellant's case before the respondent was not that disclosure would prejudice those commercial interests but that disclosure would be likely to cause such prejudice.

[14] The complainant and Transport One Limited were joined as additional parties in this appeal and participated fully at the hearing thereof.

Legislative Framework:

[15] Under **Section 1(1) FOIA** any person (referred to as “the complainant”) who has made a request to a public authority for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested (section 1(1)(a)) and (b) if it does, to have that information communicated to him (section 1(1)(b)).

[16] The duty imposed on the public authority under section 1(1)(b) will not arise where the information requested is exempted under any of the provisions contained in Part II FOIA.

[17] Part II FOIA contains both absolute and qualified exemptions (see section 21 to 44). The only provisions conferring absolute exemption are specifically

identified in section 2(3) FOIA. All others provision of Part II FOIA confer qualified exemption, i.e. they are subject to the public interest test under section 2(2) FOIA.

[18] In so far as relevant in this appeal, **Section 43(2) FOIA** states as follows: –

“(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).” Section 43(2) FOIA is a qualified exemption and is subject to a public interest test.

[19] Further in relation to this appeal the appellant and first additional party raised, just prior to the hearing, Section 41 FOIA which provides an absolute exemption, as stated at S3(g) FOIA , for information the disclosure of which would constitute an actionable breach of confidence:

S41 (1) Information is exempt information if:- it was obtained from the public authority from any other person and: the disclosure of the information to the public (otherwise than under this act) by the public authority holding would constitute a breach of confidence actionable by that or any other person.

S41 (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Despite the late introduction of reliance on this ground by the appellant, this Tribunal allowed the ground to be canvassed and heard arguments from all parties on the issues raised thereon.

[20] The appellant argues that the disputed information is exempt from disclosure under s.1(1)(b) FOIA, having regard to s.43(2) FOIA, on the grounds that the information is commercially sensitive, and its disclosure would prejudice the commercial interests of the appellant by preventing it from achieving the best value for licence fee payers in its respect of information which, if disclosed, would or would be likely to be commercially prejudicial:

Section 43(2) FOIA [Authorities bundle, Tab 1] provides an exemption in this Act where disclosure of the disputed information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

That exemption is qualified by virtue of s.2(2)(b) FOIA, which provides that in respect of an exemption, the duty to communicate the relevant information pursuant to s.1(1)(b) FOIA does not apply if or to the extent that:

The appellant argues through “s2(2)(b) that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

The appellant argues that s.43(2) Information is exempt information if disclosure result in the commercial interests of the first additional party being prejudiced by leaving it liable to have its prices undercut by competitors and challenged by existing and potential customers. As any public interest in ensuring that the appellant achieves value for money for licence fee payers would not be satisfied by the disclosure of the disputed information, the public interest in maintaining the exemption outweighs the public interest in disclosure.

[21] The Appellant further argues that the proper threshold against which the prejudice must be assessed is not, as advocated on behalf of the respondent, whether there is a “real and significant risk” that prejudice would occur, but rather whether there would “be any prejudice likely as a result of disclosure” as established in *Department of Health v Information Commissioner EA/2008/0018* [Authorities bundle, Tab 4].¹

In either event, this Tribunal is satisfied on the evidence at the hearing in this case that the qualified exemption under Section 43(2) FOIA is engaged as, we accept that on the basis of evidence (see below), there is a real and significant risk that prejudice would occur to either the appellant and/or the first additional party by the disclosure of the disputed information.

[22] The Appellant argues further:- ***“that whilst the Information Commissioner relies upon the Tribunal’s decisions in John Connor Press Associates Ltd v Information Commissioner EA/2005/0005 [Authorities bundle, Tab 10] and in Hogan and Oxford City Council v Information Commissioner EA/2005/0026 & 0030 [Authorities bundle, Tab 9] in support of his contention that to engage the exemption under s.43(2) there must be a “real and significant risk” that prejudice would occur, that test was in fact drawn from a decision of the High Court in R (On the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin), which was not concerned with the meaning of the word “likely” in the context of FOIA, but rather with the meaning of the word “likely” in the specific context of s.29(1) Data Protection Act 1998.***

In that case, Mr. Justice Munby concluded that:

“In my judgment ‘likely’ in section 29(1) connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests even if the risk falls short of being more probable than not”.²

¹ *Department of Health v Information Commissioner EA/2008/0018*, Information Tribunal, 18 November 2008, para.57

² *R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)*, para.100

However, as is clear from his conclusion, that finding was specific to s.29(1) Data Protection Act 1998, and was based on his observation that:

“I cannot accept that the important rights intended to be conferred by section 7 are intended to be set at nought by something which measures up only to the minimal requirement of being real, tangible or identifiable rather than merely fanciful. Something much more significant and weighty than that is required. After all, the Directive, to which I must have regard in interpreting section 29(1), permits restrictions on the data subject’s right of access to information about himself only (to quote the language of recital (43)) ‘in so far as they are necessary to safeguard’ or (to quote the language of Article 13(1)) ‘constitute a necessary measure to safeguard’ the prevention and detection of crime (emphasis added). The test of necessity is a strict one. The interference with the rights conferred on the data subject must be proportionate to the reality as well as to the potential gravity of the public interests involved. It is for those who seek to assert the exemption in section 29(1) to bring themselves within it, and, moreover, to do so convincingly, not by mere assertion but by evidence that establishes the necessity contemplated by the Directive.”³

By contrast, FOIA does not impose a requirement that any restriction on the rights of access to information it grants be “necessary”. The rights accorded by FOIA go beyond what is required by the right to receive information pursuant to Article 10 of the European Convention on Human Rights, and any interference with the rights accorded by FOIA is not required to be either necessary or proportionate. As such, reliance on the finding of Mr. Justice Munby in respect of s.29 Data Protection Act 1998, is, the Appellants submits, not appropriate in the context of determining the meaning of the exemption in s.43(2) FOIA and the Tribunal’s decisions in John Connor and Hogan referred to above should be disregarded in relation to this issue. The more recent decision in Department of Health should, the appellant argues be preferred.”

This tribunal accepts this interpretation and these submissions of the Appellant although as we have said on either argument and in any event, on the evidence (see below) we find that on balance the test has been met in the circumstances of this case, and Section 43(2) FOIA is engaged

[23] The appellant further argues in the alternative, even if the respondent is correct that the test as set out in John Connor is correct, that test was subsequently qualified. The appellant argues that the meaning of the phrase “likely to prejudice” means that “the chance of prejudice being suffered should be more than a hypothetical or remote possibility”⁴, although it is not necessary for the risk to be more probable than not⁵. Again, this Tribunal accepts this alternative proposition as submitted by the appellant herein.

³ *ibid*, para.99

⁴ *John Connor Press Associates Ltd v Information Commissioner*, Information Tribunal, 25 January 2006, para.15 [Authorities bundle, Tab 10, p357]

⁵ *Guardian Newspapers Ltd v Information Commissioner & BBC*, Information Tribunal, 8 January 2007, para.53 [Authorities bundle, Tab 10, p223]

[24] This Tribunal accepts the proposition made on behalf of the appellant that It is not in dispute that both the BBC and One Transport Ltd have commercial interests relevant to the subject matter of this appeal. The BBC is a public service broadcaster, established by Royal Charter and funded by the licence fee, which engages in commercial activities in so far as relates to its award of contracts for the provision of services, including the provision of a booking and management service for taxis. One Transport Ltd is a small commercial entity, a wholly-owned subsidiary of Radio Taxis Group Ltd, which provides outsourced transport consolidation and management services.

[25] The Appellants argue further that :- ***“ the disclosure of the disputed information would be likely to prejudice the BBC’s commercial interests in that it would “set an expectation of what [the BBC] will pay for a service... it would set the market rate in a small market”, as was stated by Mr. Hindhaugh in his oral evidence. That this would be the outcome of the disclosure of the disputed information was supported by Mr. Kaley who confirmed that that the likelihood would be that in the forthcoming BBC tender his competitors would use the disputed information to marginally undercut One Transport Ltd’s prices. As Mr. Hindhaugh accepted, whilst this might achieve a benefit for the BBC in slightly reducing the price currently paid, overall it would be detrimental to the BBC’s commercial interests in that it would prevent the BBC from achieving best value for licence fee payers in that the BBC would be prevented from “identifying the correct market value” for the service. This would result in the BBC “paying more” than it needed to, which would not be in the interests of licence fee payers.”***

Again this Tribunal accept the reasoning of this argument and we will refer later to the evidence, in support of it.

[26] The appellant continues in their submissions as follows and we quote in full as follows:

The Office of Government Commerce’s guidance ‘Freedom of information (civil procurement) policy and guidance’, published for the benefit of government departments, provides that there is an assumption that price breakdown information should not be disclosed throughout the term of the contract [O166].

The European Court of Justice has recognised that the asymmetric disclosure of pricing information, as would be the case if the BBC were required to disclose the disputed information, “could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure”.

The assertions of commercial prejudice of the BBC and One Transport Ltd that the disclosure of the disputed information would be prejudicial to their

respective commercial interests are not merely fanciful or illusory, but are based on experience having regard to the specific facts of this matter, including the size and maturity of the market, the nature of the service, the stage of the contract and procurement process, and the fact that this would be the first tender of the contract following the transition to outsourcing.

The BBC's refusal to disclose the disputed information is consistent with the Tribunal's previous approach to the disclosure of pricing information. In the appeal in Department of Health v Information Commissioner EA/2008/0018 [Authorities bundle, Tab 4], which the Information Commissioner declined to refer to in his Decision Notice, the Tribunal decided that all pricing information should be withheld from disclosure pursuant to s.43(2) FOIA, applying the Office of Government Commerce working assumptions, on the grounds that the disclosure of the disputed information would prejudice both the Department of Health and its 3rd party supplier in "current and future negotiations, and because of damage done, harm relationship between [the Department of Health and its 3rd party supplier]. Risk could impact on those willing to tender in future".⁶

Contrary to the Information Commissioner's finding in Decision Notice FS50259955, the disputed information falls within the scope of the exemption under s.43(2) FOIA and there is evidence that prejudice to both the BBC and One Transport Ltd would be likely as a result of disclosure of the disputed information. The exemption is thus engaged and it is therefore necessary to consider the balance of the public interests.

As set out earlier in our submissions, any public interest in ensuring that the BBC obtains value for licence fee payer's money would not be satisfied by the disclosure of the disputed information, whereas the BBC would be actually hindered in its ability to achieve value for money. There is sufficient information in the public domain to enable informed debate in relation to the BBC's taxi spend, including the information disclosed to Mr. Davis which includes the fee paid to One Transport Ltd, together with information regularly disclosed by the BBC concerning the expenditure of senior managers.

It was also argued that there is a public interest in ensuring a fair procurement process; the BBC accepts and agrees with this contention. However, the BBC does not consider that the disclosure of the disputed information would enhance the fairness of the process; this is not provided for or envisaged by the Public Contracts Regulations 2006, enacted after FOIA, and has been expressly disavowed in the context of EU competition law, enacted in the UK by those regulations:

"The principal objective of the Community rules... is the opening-up of public procurement to undistorted competition in all the Member States... In order to attain that objective, it is important that the contracting

⁶ Department of Health v Information Commissioner EA/2008/0018, 18 November 2008, para.90, [Authorities bundle, Tab 4, p167]

authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.”⁷

The disclosure of the disputed information would not be fair; it would only lead to One Transport Ltd’s commercially sensitive pricing information being known to other potential suppliers to the BBC, One Transport Ltd’s competitors, whilst One Transport Ltd would not have access to the pricing information of its competitors. The disclosure of the disputed information would not lead to fairness, but would create unfairness, the impact of which would be wider than merely the immediate procurement process.

There is, however, a public interest in maintaining fair procurement procedures, in ensuring that the BBC actually achieves value for licence fee payer’s money, in protecting the reputation and integrity of the BBC in the market as a trusted business partner, and in protecting the commercial relationship between the BBC and One Transport Ltd and with other existing and potential suppliers.

Where no public interest would be satisfied by the disclosure of the disputed information, but where the withholding of the disputed information from disclosure would satisfy the public interests detailed above (in their more detailed submissions), the public interest in withholding the disputed information from disclosure and upholding the s.43(2) exemption outweighs the public interest in disclosure. The disputed information is thereby exempt from disclosure, pursuant to s.43(2) FOIA.”

We consider this is the right approach in this case and that by reason of the evidence at the hearing of this appeal, this Tribunal accepts these submissions and endorses and adopts the reasoning therein in coming to our decision herein.

The Evidence:

[27] Jamie Hindhaugh: of the BBC gave oral evidence in addition to his witness statement of 17th December 2010 (TB pages 145 – 153). He was an impressive witness and was frank and candid in giving his evidence. He was involved in two roles at the time of the request as Head of Production and the procurement of the contract for Transport and travel. He indicated that he had qualifications and

⁷ Varec SA v Belgium C-450/06, 14 February 2008, para.34 – 37 [Authorities bundle, Tab 5, p177]

training in procurement and clearly was expert in that field. Inter-alia his evidence referred to the following:

a) Prejudice:

He was vague in his evidence in chief when suggesting there would be prejudice to the BBC with the release of the disputed information. Under cross-examination when asked “What is the evidence you have that there would be prejudice” he answered that it was hard to articulate. He referred to a) the perception of the BBC as a buyer, b) how the BBC works with buyers and the integrity of the relationship and c) setting a benchmark. He remarked that “Potentially all 3 prejudice the BBC”.

He described the BBC Tender Board as made up of :- “----- *procurement experts, legal experts etc as required. We try to get the right people to determine what is best*” He then gave detailed evidence about the tendering process and its’ complexities.

His evidence in relation to a potential bidder having the requested information, was that it enables them to understand One Transport’s bid mechanisms by means of: - “*Reverse engineering*”. Under cross examination he explained the process and the effect.

At the close of his evidence he was questioned by the Tribunal about the release of the disputed information and specifically asked how it would prejudice the BBC he answered: “We can’t say it would (*definitely*) be to our disadvantage.” He conceded “We haven’t got any evidence (*as such*)” He however explained that disclosure of the disputed information presents an expectation of what the BBC is prepared to pay. He said: “*My theory is that this creates an expectation that this is the price in the form of a benchmark*”. He continued: “*There should be no information that would allow others to see it (the tender price as disclosed in the disputed information) as a benchmark*”. It would he said “—*set a market rate in a small market*”.

On the subject of collusion which was of concern to the BBC he said: “*What I am saying as a procurement expert is there would be a risk of collusion even if there is nothing to support it in these documents (available documents)*”.

On balance he felt disclosure of the disputed information would prejudice the BBC. His evidence was that disclosure of the disputed information would clearly prejudice the commercial interests of One Transport.

b) Public Interest:

His evidence was that it is not in the public interest to disclose the disputed information inter-alia it would, he explained, prevent the BBC from being able to ensure future tenders are conducted in a fair but open environment.

[28] Geof Kaley: - Managing Director of One Transport also gave oral evidence further to his witness statement (TB pages 209 - 210). Again this was an

impressive and expert witness who gave his evidence in a helpful and meaningful manner. He has been in the Taxi business since 1972 with extensive and demonstrable expertise in the business and the tendering process. He received an MBE in 1996. Inter-alia his evidence referred to the following:

a) Prejudice:

His evidence about the impact of releasing the disputed information on his business was significant. "This gives you vital information that would be crucial information to an alternative bidder". – "---it gives away to my competitors the most crucial element of my tender", He indicated it would allow his competitors to work out his pricing structure.

Mr. Kaley indicated that the disclosure of the disputed information would give his competitors the third element necessary for his competitors to understand all the detail of his tender. It is accepted that the other two elements were already in the public domain. He indicated that this disclosure would destroy the whole concept of competitive tender. He further indicted that it would "*wreck our pricing structure which at the moment none of our customers would know*". He indicated that the impact on One Transport would be enormous in their highly competitive business, not only to a public authority customer such as the BBC but also to his private customers or potential customers. He strongly maintained that at the present time it was commercially sensitive and that market conditions had not changed significantly in the last two or three years. On any footing, he maintained it would remain commercially sensitive until the current BBC tendering process closes by the end of June 2011.

In closed session Mr Kayley demonstrated to our satisfaction how a potential bidder or other competitor, provided with the requested information could work with the other information already in the public domain to unravel his pricing mechanism and detailed information about his bidding process.

On this evidence alone we were persuaded that disclosure of the disputed information would be likely to cause prejudice to the commercial interest of the first additional party.

b) Public Interest:

Mr. Kayley gave evidence that it would not be in the public interest to release the disputed information. Inter-alia he said "*The very concept of a competitive tender puts everyone on edge. It is truly competitive. If they had the price of the last competition then they would be driven by that price rather than by a true valuation for the tender. It would distract them from a genuine cost build up of their own with a margin that could ensure their business would be sustainable. The competitive tendering environment is the best way of securing the best competitive field.*"

His evidence in this regard has persuaded this tribunal that on balance it is not in the public interest to disclose the disputed information in this case.

[29] As indicated the evidence of these two expert witnesses impressed this Tribunal. The veracity of their evidence was not in our view undermined to any significant extent under cross examination. On the basis of this evidence at the hearing and referred to above, this Tribunal is satisfied that there is likely to be prejudice to the commercial interests of the BBC and/or One Transport Limited if the disputed information is released into the public domain for the reasons given through this expert evidence. There was no evidence called to rebut the evidence of these two experts.

[30] Save the general presumption in favour of disclosure there is no evidence of any particular or specific benefit arising from disclosure of the disputed information in this case. On the contrary it is difficult to see, given the extensive information concerning this contract already in the public domain as a result of the original request, what benefit this particular information in itself would have in the public interest. There is no evidence to support the suggestion that it would, in any particular or specific sense, be in the public interest.

[31] We therefore find that Section 43(2) FOIA is engaged. Having considered the submissions at Paragraphs [25] and [26] above and heard the evidence referred to at paragraphs [27] and [28] above, this tribunal is satisfied that the disputed Information is exempt information as its disclosure would, or would be likely to, prejudice the commercial interests of the Appellant and/or the First additional party herein for the reasons outlined in the evidence.

Further this Tribunal is persuaded that the evidence, both of Mr. Hindhaugh and Mr. Kayley, demonstrates to us that on balance it is not in the public interest to disclose the disputed information for the detailed reasons they demonstrated in their evidence and referred to at paragraph [27] and [28] above. Similarly having considered the submission referred to at paragraphs [25] and [26] above and the reasons set out therein we are satisfied on balance that the Public Interest test in this case is in not favour of disclosing the disputed information.

[32] In light of the Tribunals' findings above, it is not necessary to decide whether or not Section 41 FOIA is engaged or whether or not there would be a breach of confidence by reason of disclosure of the disputed information in this particular case. However we are of the view that if, on the facts of the case, it were decided that it was in the public interest to have disclosure of the disputed information, then it is the view of this Tribunal that Section 41 FOIA would not be an obstacle to such disclosure.

Signed:

Brian Kennedy QC

11th April 2011.